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No. 10-80

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A. and BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS OF CONSTITUTIONAL LAW AND FOREIGN RELATIONS LAW IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is respectfully submitted by law professors with expertise in constitutional law and the foreign relations law of the United States. *Amici* submit this brief because they believe that the petition in the present case raises important issues of separation of powers and federalism on which guidance from this Court is needed. In particular, *amici* believe that the decision of the Court of Appeals below unduly expands federal executive authority relative to the states and Congress, contrary to this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), and to the fundamental allocations of power contained in the U.S. Constitution. The *Medellin* decision emphasizes the U.S. President's inability to make binding and preemptive law through mere policy announcements. However, the court below, along with at least one other major post-*Medellin* court of appeals decision, nonetheless accords preemptive effect to unilateral executive foreign policy unsupported by any statute, treaty or executive agreement. *Amici* submit this brief to highlight the importance of the petition to fundamental constitutional principles regarding the scope of federal executive power vis-à-vis the laws of the states.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have been given at least 10 days notice of *amici curiae*'s intention to file. Consents of the parties are on file or are being lodged herewith.

STATEMENT AND SUMMARY OF ARGUMENT

This case raises important and recurring issues of federalism and separation of powers regarding the U.S. President's unilateral authority to preempt the laws of the states. The Court of Appeals below, on the authority of this Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), held that a mere executive branch foreign policy, not incorporated into any federal statute, treaty, or executive agreement, preempts otherwise-constitutional state laws as applied to Petitioner's claims. *In re Assicurazioni Generali S.p.A.*, 592 F.3d 113 (2d Cir. 2010). The Court of Appeals' holding conflicts directly with this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, this Court held that the President's announced policy that the United States would comply with a decision of the International Court of Justice (ICJ) did not override a Texas state law that conflicted with the ICJ decision. *Id.* at 524-32. *Medellin* expressly rejected the President's preemption argument, to the extent it was based on the *Garamendi* decision, on the ground that *Garamendi* involved conflict between a state law and two executive agreements. Because there was no relevant executive agreement in *Medellin*, this Court held, *Garamendi* did not support preemption of Texas' law by executive policy. *Id.* at 530-32.

This Court's decision in *Medellin* reaffirms basic constitutional principles of separation of powers and federalism. First, a central principle of federalism is that state law is valid unless it is incon-

sistent with the U.S. Constitution or in conflict with an act of federal lawmaking. Article VI of the Constitution establishes the Constitution and federal laws and treaties as "supreme Law of the Land" and thus superior to state law. Mere presidential policies are not accorded such status. Second, a central principle of separation of powers is that the President is not a lawmaker. The Constitution grants the President "the executive Power," U.S. Const. Art. II, Sec. 1; in contrast, Congress holds "[a]ll legislative Powers herein granted." U.S. Const., Art. I, Sec. 1. The core meaning of "executive Power" is that the President executes law made by others. As James Madison explained in *Federalist 47*, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." James Madison, Alexander Hamilton and John Jay, *The Federalist Papers, No. 47* (Isaac Kramnick, ed., 1987), at 304, *quoted in Medellin*, 552 U.S. at 528.

The combination of these principles, this Court concluded in *Medellin*, rejects the contention, advanced by the President in that case, that the President through the articulation of foreign policy can "establish binding rules of decision that preempt contrary state law." *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (making this argument). To accept the President's argument, this Court explained, would make the President a lawmaker, contrary to the President's constitutional status as the holder of executive power. *See Medellin*, 552 U.S. at 524-32.

Although there may be limited exceptions – specifically, certain executive agreements made

with Congress' implicit approval, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981) – *Medellin* makes clear that *Garamendi* does not broadly overturn these basic constitutional principles with respect to all executive branch foreign policy in the way imagined by the Court of Appeals. To the contrary, *Medellin* reaffirms that, despite *Garamendi*, the basic rule remains that executive policies do not preempt state law unless and until they achieve the status of supreme law in the manner specified by Article VI. *See Medellin*, 552 U.S. at 531 (describing *Garamendi* and related cases as "involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals"); *see also Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994) (finding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [tax laws]."); *Breard v. Greene*, 523 U.S. 371, 378 (1998) (finding that the President could only ask, but not require, Virginia to comply with a provisional order from the ICJ).

As a result, the decision below directly conflicts with *Medellin*. Like the state law in *Medellin*, the state laws under which Petitioner brought his claims are clearly constitutional, and indeed (unlike in *Garamendi*) most of them are part of the state's ordinary and generally applicable contract and insurance law (as the law in *Medellin* was part of Texas' ordinary and generally applicable criminal law). As in *Medellin*, there is no applicable federal statute, treaty or executive agreement with

which the state laws in the present case conflict. As in *Medellin*, the only conflict claimed by the court below is between the state laws and an executive branch foreign policy. Basic constitutional principles, reaffirmed in *Medellin*, make clear that such a conflict is insufficient to override rights established under state law.

This is an issue of recurring importance warranting this Court's granting of a writ of certiorari. In addition to the decision below, at least one other post-*Medellin* court of appeals decision has, despite *Medellin* and on the authority of *Garamendi*, given preemptive effect to mere presidential policy unsupported by any federal law, treaty or executive agreement. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009). On the other hand, as the petition here highlights, other courts have – like *Medellin* – read *Garamendi* to apply only to conflicts with certain executive agreements and have not recognized preemption by mere executive branch policy. *See Petition for a Writ of Certiorari, Weiss v. Assicurazioni Generali S.p.A.*, No. 10-80, at 10-11 (citing cases). Granting review would allow this Court to clarify this fundamental constitutional relationship between federal executive power, federal lawmaking power, and state law.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF SEPARATION OF POWERS AND FEDERALISM

A. The Constitution's Basic Principles of Separation of Powers and Federalism Require that Mere Presidential Policies Cannot Displace Otherwise-Constitutional State Law.

The U.S. Constitution sets forth two basic principles of federalism and separation of powers that govern this case. First, state law is valid unless displaced by a superior source of federal law. Second, the President is not a lawmaker.

The first principle is established by the Constitution's Article VI, which provides that the Constitution, the "Laws of the United States which shall be made in Pursuance thereof," and federal treaties make up the "supreme Law of the Land." U.S. Const., Art. VI, cl. 2. Thus under Article VI, state law can be displaced by "supreme" federal law in two (but only two) ways: if the Constitution itself prohibits the state from acting, or if an act of supreme federal lawmaking overrides the state's law. Further, in addition to the Constitution itself, supreme federal law arises from treaties and laws made "in pursuance of" the Constitution; the Constitution's Article I, Section 7 in turn specifies the procedures by which federal law is made.

Article VI and Article I, Section 7 impose substantial procedural hurdles for the creation of federal law. It must be done (a) with the approval of majorities of both of the two separately-elected houses of Congress and of the President, (b) with a supermajority of both houses, or (c) in the case of treaties, with the approval of the President plus a supermajority of the Senate. These hurdles safeguard state interests and protect the Constitution's

federal structure, assuring that state laws are not displaced unless multiple federal actors agree that they should be.[2]

Under the second principle, as a matter of separation of powers the Constitution's designation of the President as holding "the executive Power," U.S. Const., Art. II, Sec. 1, shows the President's lack of independent lawmaking power. *Compare* U.S. Const., Art. I., Sec. 1 (stating that "[a]ll legislative Powers herein granted" shall be vested in Congress). While the precise scope of the President's "executive Power" may remain unclear, a common core understanding is that the President cannot unilaterally make law (that is, change individual legal rights and duties); to the contrary, the President's core power and authority is to execute laws made by others. The Constitution's framers saw this limit as an important check on the powerful executive office they created, and they derived it from an equally central feature of English constitutional law, which held that the king could not make law without Parliament's consent. *See* 1 William Blackstone, Commentaries on the Laws of England 142-43, 261 (1765); 4 *id.* at 67. As James Madison explained in *Federalist 47*, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." James Madison, Alexander

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[2] As discussed below, this Court has recognized that in "a narrow set of circumstances" state law may be preempted by certain executive agreements to which Congress has implicated assented. *See Medellin*, 552 U.S. at 531. As the Court of Appeals recognized, 592 F.3d at 118-19, no executive agreement conflicts with Petitioner's claims in this case.

Hamilton and John Jay, The Federalist Papers, *No. 47* (Isaac Kramnick, ed., 1987), at 304.[3]

These basic principles came together in this Court's most celebrated case on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, President Harry Truman by executive order directed the seizure of major U.S. steel mills due to an impending strike in order to avoid an interruption of military supplies to the on-going war effort in Korea. This Court found the President's order to be an unconstitutional law-making act.

Justice Black's opinion for the Court assumed the first proposition described above: that state law governed unless displaced by federal law. The mill owners held property rights under state law. Absent a conflicting federal act, the state law was obviously constitutional and formed the baseline of the mill owners' rights. The question in the case was whether any federal act displaced the state law. Since there was no conflicting treaty or act of Congress, the question was whether the President's order had that effect.

This Court held that it did not, applying the basic proposition that the President was not a lawmaker. As Justice Black wrote for the Court:

> In the framework of our Constitution, the President's power to see that the laws are

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[3] *See* Michael D. Ramsey, The Constitution's Text in Foreign Affairs 91-114 (Harvard U. Press 2007); Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 906-24 (2004).

> faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States...."

Id. at 587-88.[4]

Although Justice Black's opinion did not fully explain why the Court regarded the President's act as a lawmaking act, the answer is evident: the President's order in *Youngstown* sought to change rights under existing law. Because state law was the baseline, the mill owners had a legal right to their property which the President sought to alter. For this reason, if mere presidential policy were to be preemptive, that would grant lawmaking power to the President.

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[4] Justices Jackson and Frankfurter (among others) concurred to suggest some flexibility in the extent of executive power, but they did not dispute Justice Black's central premise that the President is not a lawmaker. In particular, Justice Jackson's concurrence suggested that the President might have greater latitude in certain cases when Congress has approved the President's action. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981). There is no argument, however, that in the present case that the President has taken any formal action concerning claims against Italian companies such as Generali, much less that Congress has approved any such action.

In sum, the core constitutional problem in *Youngstown* was that the President tried to make executive policy superior to existing state law. Both Article II and Article VI show this to be beyond the President's power. Under Article II, the President, like the eighteenth-century English monarch, cannot use "executive" power to issue decrees with the force of law. Article VI confirms this limit by setting forth the ways the federal government can act with the force of supreme law and by confining the President's lawmaking role to action in conjunction with one or both houses of Congress.

B. The Decision Below Conflicts with Basic Constitutional Principles by Giving Preemptive Effect to Mere Presidential Policy.

In the decision below, the Court of Appeals departed from these basic constitutional principles by giving preemptive effect to mere executive branch policy. Petitioner, who is the heir of Holocaust survivors, brought suit under various provisions of state law against Respondent Assicurazioni Generali S.p.A. and related entities ("Generali") to recover on insurance policies Generali issued to his decedents before or during the Holocaust. The U.S. executive branch has been involved for many years in supporting an international non-governmental body, the International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), to settle Holocaust-era insurance claims. The Court of Appeals found that an executive branch policy of resolving claims through ICHEIC preempted state law as

applied to Petitioner's case. *In re Assicurazioni Generali S.p.A*, 592 F.3d at 118-19.

As the Court of Appeals recognized, no ordinary source of preemptive federal law conflicts with the state laws in the present litigation. The Constitution itself prevents states from acting in certain foreign affairs categories, either explicitly (chiefly in Article I, Section 10)[5] or by implication. However, none of these constitutional provisions implicates the state laws at issue here.[6] In addition, Article VI establishes treaties and statutes as preemptive federal law by making them (along with the Constitution itself) part of the "supreme Law of the Land." Again, it is not argued that the state laws at issue here conflict in any way with any federal statute or treaty.

Finally, there is no conflict between Petitioner's state-law claims and any applicable executive agreement. Although executive agreements (international agreements not made through the treaty-making process of Article II) fit uncomfortably with

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[5] Article I, Section 10 lists certain specific actions the states cannot take, or can take only with Congress' consent, such as engaging in war or making treaties and other international agreements.

[6] In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court found that the Constitution implicitly precluded some state intrusions into U.S. foreign affairs whether or not they conflicted with announced U.S. foreign policy. The Court of Appeals did not rely on *Zschernig*, which appears limited to situations in which a state law directly insults or passes judgment upon a particular foreign government. That circumstance is plainly not implicated here.

the sources of preemptive law described in Article VI, this Court's prior decisions recognize that in certain circumstances executive agreements may have a preemptive effect akin to that of treaties. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *see also Medellin*, 552 U.S. at 531-32 (noting that "in a narrow set of circumstances" executive agreements have been regarded as preempting state law). In the present case, however, there is no governing executive agreement. The U.S. President has entered into executive agreements relating to Holocaust-era insurance claims with Germany and Austria; Generali is an Italian company and the U.S. President has not entered into any executive agreement with Italy in this regard. *See In re Assicurazioni Generali*, 592 F.3d at 118-119 (expressly concluding that the absence of an executive agreement did not preclude preemption); *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.*, 228 F.Supp.2d 348, 358 (S.D.N.Y.2002) (finding that "no executive agreement at issue in this case could be read to preclude litigation of [Petitioner's] claims in U.S. courts").

Nonetheless, on the strength of this Court's decision in *American Insurance Association v. Garamendi*, the Court of Appeals found that an executive branch *policy* of resolving claims (including claims against Generali) through ICHEIC preempted Petitioner's state law claims. *See In re Assicurazioni Generali*, 592 F.3d at 118-119 (repeatedly describing the state law claims as conflicting with executive "policy"). As the Court of Appeals made clear, the holding below was based di-

rectly on reading *Garamendi* to allow preemption by executive policy even absent a governing executive agreement. *Id.* at 119 (asserting that this Court in *Garamendi* "did not view the existence of an executive agreement as a prerequisite" to executive branch policy preemption).

The Court of Appeals' expansive reading of *Garamendi* conflicts with the basic constitutional principles set forth above. As described in the next section, it also squarely conflicts with this Court's decision in *Medellin* (which the Court of Appeals dismissed without explanation in a one-sentence footnote, see 592 F.3d at 119 n.2).

II. *MEDELLIN V. TEXAS* REAFFIRMED THAT MERE PRESIDENTIAL FOREIGN POLICY DOES NOT DISPLACE STATE LAW AND REJECTED BROAD READINGS OF *GARAMENDI* TO THE CONTRARY

A. In *Medellin*, this Court Refused to Find a State Law Preempted by a Mere Presidential Foreign Policy

This Court recently reaffirmed the foregoing constitutional principles as applied to presidential foreign policy in *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, this Court – rejecting arguments by the executive branch that closely parallel the Court of Appeals' reasoning in the present case – held that even a "plainly compelling" presidential foreign policy, *see* 552 U.S. at 524, could not displace an otherwise-valid state law. *See id.* at 524-32.

The President argued in *Medellin* that the President's policy that the United States would comply with an International Court of Justice (ICJ) judgment should displace a provision of Texas criminal procedure that conflicted with the ICJ judgment. *See id.* at 523-24. Jose Medellin, the petitioner and a Mexican national, had been convicted and sentenced to death in Texas state court. In a case brought by Mexico on his behalf, the ICJ held that he was entitled to have his sentence reconsidered because he had not been afforded his rights under an applicable treaty, the Vienna Convention on Consular Relations. The Texas courts held that Texas law did not permit such reconsideration.

This Court and the President agreed that the ICJ judgment was not self-executing and thus not directly enforceable as preemptive federal law. *See id.* at 507-23. However, as this Court recounted, "President George W. Bush determined, through a Memorandum to the Attorney General ... that the United States would 'discharge its international obligations' under [the ICJ judgment] 'by having State courts give effect to the decision.'" *Id.* at 503, *quoting* the President's memorandum of Feb. 28, 2005. According to the President, the presidential policy reflected in this memorandum displaced Texas' state law and entitled Medellin to a new hearing on his sentence. *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (arguing that the President by announcing U.S. foreign policy has power to "establish binding rules of decision that preempt contrary state law.").

This Court flatly rejected the claim that the President had unilateral power to preempt Texas

law in order to enforce a non-self-executing treaty. In doing so, this Court tied the question directly to the question of presidential lawmaking powers:

> Once a treaty is ratified without provisions clearly according it domestic effect ... whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" [quoting *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), internal quotation omitted]; see U.S. Const., Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, §7.

Medellin, 552 U.S at 526. Thus this Court's conclusion proceeded in two steps: (1) converting a non-self-executing treaty into a domestic legal obligation that preempts state law is a lawmaking act; and (2) the President is not a lawmaker. This approach follows directly from this Court's opinion in *Youngstown*, and this Court in *Medellin* quoted Justice Black's observation in *Youngstown* that "'the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.'" *Id., quoting Youngstown,* 343 U.S. at 587. *Medellin* also invoked Madison's statement in *Federalist No. 47* that "[t]he magistrate in whom the whole executive power resides cannot of himself

make a law" and pointedly observed "[t]hat would ... seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty." *Medellin*, 552 U.S. at 527-28.

In reaching this conclusion, this Court rejected executive branch arguments that the President's constitutional foreign affairs powers include power to "establish binding rules of decision that preempt contrary state law." That claim, this Court held, violated the "fundamental constitutional principle that '[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" *Id.* at 526. This Court reached that conclusion, moreover, even though it acknowledged the "plainly compelling" importance to U.S. foreign affairs of the decision whether or not to comply with the ICJ judgment. *Id.* at 524.

In sum, the *Medellin* decision strongly reaffirms the proposition that, even in matters potentially affecting foreign affairs, the President cannot make law and otherwise-valid state law cannot be displaced by mere presidential foreign policy.[7]

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[7] The result in *Medellin* comports with this Court's prior decisions addressing the question. *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994) (finding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [tax laws]."); *Breard v. Greene*, 523 U.S. 371, 378 (1998) (finding that the President could only ask, but not require, Virginia to comply with a provisional order from the ICJ).

B. This Court's Decision in *Medellin* Limits *American Insurance Association v. Garamendi*, on which the Court of Appeals Relied, to State Laws that Conflict with Executive Agreements

The Court of Appeals below relied heavily on *American Insurance Association v. Garamendi* to conclude that executive branch policy, even if not reflected in an executive agreement, preempts state law. *See* 592 F.3d at 118-119. As *Medellin* makes clear, however, *Garamendi* should not be read so broadly. The executive branch advanced exactly the same reasoning in *Medellin* as the Court of Appeals employed here, and this Court expressly rejected it.

In *Garamendi*, this Court held that a California law governing Holocaust-era insurance contracts was preempted by the executive policy reflected in executive agreements with Germany and Austria relating to ICHEIC and to Holocaust-era claims against German and Austrian companies. *Garamendi*, 539 U.S. at 423-28. The Court of Appeals below read *Garamendi* to endorse a broad executive foreign policy preemption not limited to the effect of particular executive agreements, and relied on this reading of *Garamendi* in holding Petitioner's state law claims to be preempted. *See* 592 F.3d at 118-119.

However, this Court' s decision in *Medellin* expressly rejected a broad reading of *Garamendi*. In *Medellin*, the executive branch relied heavily on a broad reading of *Garamendi* – akin to the reading adopted by the Court of Appeals in the present case – to support its claim of executive foreign policy

preemption. In response, this Court, in addition to rejecting the executive's position on broader constitutional principles, directly addressed *Garamendi* and described a much more limited view of *Garamendi*'s holding. *Garamendi*, this Court explained, rested centrally on the presence of the German and Austrian executive agreements, and thus followed directly from prior cases such as *Dames & Moore* establishing the preemptive effect of certain executive agreements. As this Court put it, *Garamendi* was one of "a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement." *Id.* at 530-31 (citing *Dames & Moore*, *Pink*, and *Belmont*, all of which involved preemptive executive agreements). "The claims-settlement cases," this Court continued, "involve a narrow set of circumstances: *the making of executive agreements* to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531 (emphasis added). Moreover, the *Medellin* Court added, these prior cases relied on congressional assent to the President's longstanding practice of making such executive agreements, and "the limitations on this source of executive power are clearly set forth." *Id.* Thus, this Court concluded, *Garamendi* had no force in a case such as *Medellin*, where there was no executive agreement, but only an executive branch foreign policy. *Id.*

C. The Decision Below Directly Conflicts with this Court's Decision in *Medellin*

The decision below, relying on *Garamendi* in the absence of an executive agreement and finding

that mere executive branch policy preempts state law, fundamentally conflicts with this Court's decision in *Medellin*. As discussed, *Medellin* held that the President's policy that states would comply with the ICJ's order, as reflected in a presidential memorandum but not otherwise incorporated into federal law, did not preempt a Texas law that conflicted with the ICJ's order. Further, this Court in *Medellin* noted that *Garamendi* was not to the contrary, because *Garamendi* involved the President's power to settle claims "pursuant to an executive agreement." 552 U.S. at 530-31.

The Court of Appeals below failed to address *Medellin* directly, dismissing it in a non-substantive footnote. *See* 592 F.3d at 119 n.2 (citing *Medellin* and finding, without explanation, "nothing inconsistent" with its decision). But Petitioner's rights under state law can be displaced only by holding (as the Court of Appeals did) that mere executive branch "policy," not incorporated into any executive agreement, is preemptive. *See id.* (expressly finding that an executive agreement is "not a prerequisite" to preemption by executive policy). That proposition is exactly what this Court rejected in *Medellin*. As discussed above, in *Medellin* the President announced a policy that the states would comply with the ICJ's order, but this Court found that policy not to preempt conflicting Texas state law because the policy was not supported by a federal lawmaking act.

III. This Case Presents an Issue of Wide-Ranging Practical Importance Relating to the President's Power over State Law

The decision below, which appears to set no limits on the President's ability to displace state law pursuant to unilateral executive branch policy, would fundamentally alter both the relationship between the President and the states, and the relationship between the President and Congress. Because there are few institutional checks upon the President's ability to formulate policy, the decision's practical effect would be to grant the President a general supervisory power over state laws.

This case in particular illustrates the dangers of such a result. Under the Court of Appeals' ruling, a mere indication of policy from the executive branch – even, as in the present case, an indirect or informal indication not made by the President himself – can displace state law. In contrast, if at minimum a valid, congressionally-approved executive agreement is required for preemption, institutional limits may be maintained because the President must act formally, in concert with a foreign nation, pursuant to a commitment that becomes binding on the nation under international law, and with implicit congressional authorization.[8]

Further, the Court of Appeals appeared not to impose any limits on the kind of state law sub-

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[8] To be clear, this case does not raise, and this brief takes no position on, the question of the circumstances under which an executive agreement can be preemptive of state law. This Court in *Medellin* noted that its prior cases giving certain executive agreements preemptive effect involved a "narrow set of circumstances" as well as implicit congressional approval. *See Medellin*, 552 U.S. at 531. In the present case, as the Court of Appeals acknowledged, there is no executive agreement of any sort in conflict with the state laws under which Petitioner's claims are raised.

ject to executive preemption. Most of the state laws on which Petitioner's claims are based are laws of general application, not specifically directed toward Holocaust-era claims or indeed any foreign affairs matters. They are simply ordinary state laws of contract and insurance.[9] In today's interconnected and globalized world, the President may plausibly claim that any state law, no matter how central to the state's own internal affairs, implicates the President's foreign policy and thus may be preempted on presidential say-so.

As a result, the decision below would, across a broad range of subjects and policies, substantially shift power to the President at the expense of Congress and the states. As described, the Constitution protects states by establishing a complex federal lawmaking process which must be navigated before preemptive law is made. Indeed, a fundamental protection for federalism values is that federal law can be made only through these difficult procedures. A leading academic commentary explains:

> Although the Supremacy Clause performs the familiar function of securing the primacy of federal law over contrary state law, it also necessarily constrains the exercise of federal power by recognizing only three sources of law as "the supreme Law of the Land." ....

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[9] *See* Michael Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309, 350 (2006) (noting "the important distinction ... between a prohibition on targeted state obstruction of external affairs and the power of the national government to displace neutral state laws of general application in areas of traditional state competence").

> The Founders, in turn, prescribed finely wrought and exhaustively considered procedures elsewhere in the Constitution to govern the adoption of each type of law recognized by the Supremacy Clause. ... [F]ederal lawmaking procedures ... preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism. The text, structure, and history of the Constitution, moreover, suggest that these procedures were meant to be the exclusive means of adopting "the supreme Law of the Land." Permitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority.

Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1323 (2001). Allowing mere presidential policy to preempt state law, as the President advocated unsuccessfully in *Medellin*, and as the Court of Appeals below permitted, circumvents these protections the Constitution established for the states.

The decision below also enhances presidential power at the expense of Congress. The Constitution limits the President's power relative to other branches of the federal government by assuring that if the President wants presidential policies to have legally binding effect, the President must secure the cooperation of Congress (or of two-thirds of the Senate in the case of treaties). This provides a powerful check upon unilateral presidential policy. As discussed, under eighteenth-century English

law, leading authorities such as Blackstone – who in turn heavily influenced the American framers – saw an essential guarantee of liberty in the ancient rule that the monarch could not make law by decree. Not surprisingly, in creating and explaining the office of the Presidency, the framers adopted and invoked the fundamental rule that, as in England, the holder of executive power could not "of himself make a law." Madison, *supra*, at 304. That power they instead assigned to Congress. Correspondingly, the question whether individual rights established under otherwise-constitutional state law should be displaced in the national interest is fundamentally a question for Congress. *See Youngstown,* 343 U.S. at 587-88. The decision below would, across a broad range of cases, reallocate it to the President.

As a result, the decision below has fundamental constitutional ramifications far beyond its particular facts. By reading *Garamendi* broadly, without attention to the limits this Court emphasized in *Medellin*, the decision below would allow the President alone to decide which state laws should and should not remain in effect. Certiorari is warranted to clarify the limits of the President's ability to displace state law by executive "policy," see 592 F.3d at 118-119, unsupported by any federal lawmaking act.

IV. CONCLUSION

Amici respectfully urge that this Court grant a writ of certiorari to address the important issues of separation of powers and federalism raised by the petition.

Respectfully submitted,

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